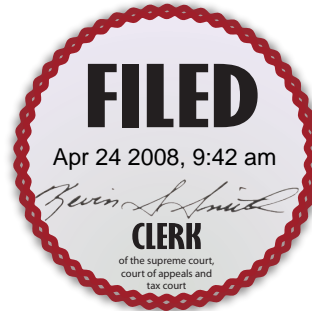


Pursuant to Ind.Appellate Rule 15(A)(3), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

EMMETT WHITE,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 49A02-0711-CR-929
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patricia Gifford, Judge
Cause No. 49G04-0705-FC-98205

April 24, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Defendant Emmett White appeals from the trial court's order of restitution imposed following his guilty plea to Class C felony Forgery,¹ alleging that the trial court abused its discretion in ordering that he pay restitution for acts that did not form the basis of his conviction. We affirm in part, reverse in part, and remand with instructions.

FACTS

On or about May 7, 2007, White uttered a check in the amount of \$6170.00 to Rick Sideman of the Raspberry Building Corporation ("Raspberry") in Marion County. The check was drawn on the account of Pro Built Incorporated and was purportedly signed by its owner Robert Abbott. In fact, the check had been stolen from Abbott, and he had neither written the check nor authorized White to do so. The State charged White with Class C felony forgery.

On August 29, 2007, White signed a plea agreement, which provided, *inter alia*, that he "shall pay restitution to the victims(s), Robert Abbott and Raspberry Building Corp., through the Marion County Probation Department, as follows: 1) Robert Abbott in the amount of \$_____. 2) Raspberry Building Corp.: \$6,170.00." Appellant's App. pp. 22-23. At his guilty plea hearing, White agreed that he would "be required to pay restitution to Robert Abbott and Raspberry Building Corporation[.]" Tr. p. 3. White pled guilty as charged.

At White's sentencing hearing, Abbott testified that White had, in fact, written other checks on his account, including two, in the amounts of \$1200.00 and \$1257.00,

¹ Ind. Code § 35-43-5-2(b) (2006).

which had been “total loss[es]” to him. Tr. p. 13. Abbott also testified that White had taken a set of tools and tool bag valued at \$500.00 from his truck. The trial court sentenced White to eight years of incarceration, with five suspended to probation, and ordered that he pay \$6170.00 in restitution to Raspberry and \$3000.00 to Abbott.

DISCUSSION AND DECISION

Whether the Trial Court Abused its Discretion in Ordering Restitution

A. Restitution for Uncharged Acts

Restitution orders following a criminal conviction are governed by Indiana Code section 35-50-5-3 (2006), which provides in relevant part that “in addition to any sentence imposed under this article for a felony or misdemeanor, the court may, as a condition of probation or without placing the person on probation, order the person to make restitution to the victim of the crime[.]” “The court shall base its restitution order upon a consideration of ... property damages of the victim incurred as a result of the crime, based on the actual cost of repair (or replacement if repair is inappropriate)[.]” *Id.*

“Generally, an order of restitution is within the trial court’s discretion, and it will be reversed only upon a finding of an abuse of that discretion.” *Green v. State*, 811 N.E.2d 874, 877 (Ind. Ct. App. 2004) (citing *Davis v. State*, 772 N.E.2d 535, 540 (Ind. Ct. App. 2002)). “An abuse of discretion occurs when the trial court misinterprets or misapplies the law.” *Id.* (citing *Tapia v. State*, 753 N.E.2d 581, 585 (Ind. 2001)). As a general rule, restitution will be limited to those crimes of which a defendant is found guilty or to which he pled guilty. *See Green v. State*, 811 N.E.2d 874, 879 (Ind. Ct. App. 2004) (citing *Polen v. State*, 578 N.E.2d 755, 756 (Ind. Ct. App. 1991)). Restitution will

not be limited in this way, however, where the defendant agrees to pay greater restitution or admits to damages in a greater amount. *See id.*

We conclude that White's plea agreement expressed his willingness to pay restitution greater than that stemming from the one forgery to which he pled guilty. White signed a plea agreement in which he specifically agreed to pay restitution to Abbott, even though the restitution he agreed to pay Raspberry fully covered the damages caused by the forgery to which he pled guilty. Moreover, White specifically agreed that the actual *amount* of restitution to Abbott would be determined at sentencing, as it was. In the end, all parties complied fully with the provisions of White's plea agreement, an agreement that provided for restitution to Abbott. After having received the benefit of his negotiated plea agreement, White should not now be able to complain that the restitution to Abbott was not authorized.

B. Whether Sufficient Evidence Supports the Trial Court's Order of Restitution to Abbott

White further contends that, even if the trial court was authorized to order restitution to Abbott, the evidence presented at sentencing was insufficient to establish his losses. White, however, provides us with no authority standing for the proposition that testimony is somehow inherently insufficient to prove a loss in this context, and we are able to find none. Abbott testified that White's "fraudulent use of [his] checking account" had resulted in two checks drawn on his account that were paid by his bank but for which he had not been reimbursed, one in the amount of \$1200.00 and the other for \$1257.00. Tr. p. 13. Abbott also testified that White stole a tool kit from his truck worth

\$500.00. Abbott's testimony fully supports a finding that he suffered losses in those amounts, even in the absence of additional documentary evidence. *See, e.g., Blixt v. State*, 872 N.E.2d 149, 153-54 (Ind. Ct. App. 2007) (concluding that testimony regarding out-of-pocket medical expenses was sufficient to establish amount of loss). The trial court, however, entered a restitution order in the amount of \$3000.00, and Abbott's testimony only established losses in the amount of \$2957.00. On remand, the trial court is instructed to order restitution to Abbott of no greater than \$2957.00.

C. White's Ability to Pay Restitution

White also contends that the trial court ordered restitution as a term of his probation and, as such, was required to inquire into his ability to pay, which it did not do.

[W]hen restitution is ordered as a condition of probation or a suspended sentence, the trial court must inquire into the defendant's ability to pay in order to prevent indigent defendants from being imprisoned because of their inability to pay. *Shaffer v. State*, 674 N.E.2d 1, 9 (Ind. Ct. App. 1996). However, when restitution is ordered as part of an executed sentence, an inquiry into the defendant's ability to pay is not required. *Id.* In such a situation, restitution is merely a money judgment, and a defendant cannot be imprisoned for non-payment. *Id.*; Ind.Code § 35-50-5-3(a) and (b).

Ladd v. State, 710 N.E.2d 188, 192 (Ind. Ct. App. 1999). Although no inquiry was conducted into White's ability to pay restitution, there is no indication in the record that it was ordered as a term of his probation. As such, no such inquiry was required.

Conclusion

We conclude that the trial court did not abuse its discretion in ordering White to pay restitution to Abbott, as he specifically agreed that he would, but that the order exceeded Abbott's demonstrated loss of \$2957.00. Finally, the trial court was not

required to inquire into White's ability to pay restitution, as he has failed to show that restitution was made a term of his probation. We affirm in part, reverse in part, and remand with instructions to enter a restitution order to Abbott of no greater than \$2957.00.

BARNES, J., and CRONE, J., concur.